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No. 85-555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS TRUST COMPANY,
Petitioner,

vs.

THELMA T. METGE, Executrix of the Estate of August Metge, and ELIZABETH G. SHEPARD, on behalf of themselves and on behalf of all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

REPLY BRIEF OF PETITIONER TO RESPONDENTS' BRIEF IN OPPOSITION

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Respondents are in error in asserting that the Bank's Petition for Certiorari merely raises factual arguments. As Judge Stuart found, the facts are not in dispute, only the inferences which may be drawn from the facts.

Accepting the facts recited by the Court of Appeals for the Eighth Circuit at face value, they do not show substantial evidence of aiding-abetting. The Court of Appeals only recites facts showing "knowledge of the program" (that Thrift Certificates were being sold). It does not indicate any facts showing knowledge of the violation, actual knowledge that the fraud of non-disclosure was occurring.

Similarly, on the element of substantial assistance to the violation, the Eighth Circuit cites no facts showing substantial assistance by the Bank to the violation or fraud. There is a clear difference between the opinions of the District Court and Circuit Courts here. Judge Stuart correctly found that the substantial assistance must be to the violation, to the fraud itself, not merely to the violator generally. The Eighth Circuit does not recognize this difference and holds that assistance to the violator in "keeping it afloat", that is not calling the loan, constitutes assistance to the fraud. No other Court has so held.

Decisions are not made in a vacuum. A Court of Appeals cannot recite a correct rule of law and then mis-apply the undisputed facts to the law to secure an incorrect result. A simple reading of the opinions of the District Court and Court of Appeals shows an inherent difference in the application of the same facts to be the same law. This difference is so glaring that this Court could well exercise its general supervisory powers over the Courts of Appeal by ordering summary reversal and reinstatement of the District Court's opinion.

Respectfully submitted,

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